(3) 97-1009

SUPREME COURT, U.S.
FILED
JAN 16 1998
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

JOHN KNOX WALKUP, Attorney General of the State of Tennessee, *et al.*,

Petitioners,

vs.

BOARD OF COUNTY COMMISSIONERS OF SHELBY COUNTY, *et al.*,

Respondents,

SHELBY COUNTY BOARD OF EDUCATION, *et al.*,

Intervenor Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS BOARD OF COUNTY COMMISSIONERS OF SHELBY COUNTY AND COUNTY OF SHELBY

DONNIE E. WILSON
Shelby County Attorney
160 North Main Street
Suite 660
Memphis, Tennessee 38103
(901) 576-4230

BRIAN L. KUHN
Assistant County Attorney
FARRIS, MATHEWS, BRANAN & HELLEN, PLC
2000 One Commerce Square
Memphis, Tennessee 38103
(901) 575-0100

JOHN L. RYDER*
Assistant County Attorney
APPERSON, CRUMP & MAXWELL, PLC
2110 One Commerce Square
Memphis, Tennessee 38103
(901) 525-1711

* *Counsel of Record*

Attorneys for Respondents Board of County Commissioners of Shelby County and County of Shelby

25 pp

QUESTION PRESENTED FOR REVIEW

Whether school district residents' Fourteenth Amendment rights against vote dilution prevail over a State's interest in a uniform system of electing county school boards.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Constitutional and Statutory Provisions	1
Statement of the Case	2
A. Statement of the Facts	2
B. Proceedings Below	6
Summary of the Argument	7
Reasons for Denying the Writ	9
I. The Court Of Appeals' Determination Of The Proper Electoral Jurisdiction As The Shelby County School District, Rather Than Shelby County, Is In Conformance With Precedents Of This Court, And Of All Circuits That Have Addressed The Issue.	9
II. The Sixth Circuit Opinion Does Not Create New Rights, But Affirms And Applies Existing Rights.	14
Conclusion	19

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Anderson v. Celebrezze, 460 U.S. 780 (1983) 15

Board of County Commissioners v. Burson, 121 F.3d 244 (6th Cir. 1997) 5, 6, 8, 9

Carrington v. Rash, 380 U.S. 89 (1965) 16, 17

Creel v. Freeman, 531 F.2d 286 (5th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1976) 8, 13

Davis v. Linville, 864 F.2d 127 (11th Cir. 1989), *reh. denied* 8

Duncan v. Coffee County, Tennessee, 69 F.3d 88 (6th Cir. 1995) 4, 6, 7, 8, 9, 11, 13, 16

Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972) 8

Evans v. Cornman, 398 U.S. 419 (1970) 16, 17

Hogencamp v. Lee Co. Bd. of Education, 722 F.2d 720 (11th Cir. 1984) 8

Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978) 8, 10

Contents

Page

Hosford v. Ray, 806 F. Supp. 1297 (S.D. Miss. 1992) 8, 13

Kramer v. Union Free School District, 395 U.S. 621 (1969) 16

Locklear v. North Carolina St. Bd. of Education, 514 F.2d 1152 (4th Cir. 1975) 8, 13

Miyazawa v. City of Cincinnati, 45 F.3d 126 (6th Cir. 1995) 15, 16

Phillips v. Andress, 634 F.2d 947 (5th Cir. 1981) 8, 13

Reynolds v. Sims, 377 U.S. 533 (1964) 14, 17

Sailors v. Kent Board of Education, 387 U.S. 105 (1967) 13, 16

Southern v. Beeler, 183 Tenn. 272, 195 S.W. 2d 857 (1946) 4

Sutton v. Escambia County Bd. of Education, 809 F.2d 770 (11th Cir. 1987) 8

Statutes Cited:

Tenn. Code Ann. § 49-2-201 2

Tenn. Code Ann. § 49-2-201(a)(1) 3

Tenn. Code Ann. § 49-2-201(c) 4, 5, 17

Contents

	Page
1868-1869 Tenn. Priv. Acts, ch. 30	3
1923 Tenn. Priv. Acts, ch. 381	2
United States Constitution Cited:	
Fourteenth Amendment	i, 1, 6, 9
Fourteenth Amendment § 2	1
Tennessee Constitution Cited:	
Tenn. Const. art. XI, § 17	1, 3
Other Authorities Cited:	
25 *Am.Jur.2d*, "Elections" § 31	16
25 *Am.Jur.2d*, "Elections" § 103	15

CONSTITUTIONAL AND STATUTORY PROVISIONS

The supremacy clause of the United States Constitution, art. VI, § 2, reads:

> This Constitution, and the laws of the United Sates which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

The Fourteenth Amendment to the United States Constitution states in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article XI, § 17 of the Constitution of Tennessee states:

> No County office created by the Legislature shall be filled otherwise than by the people or the County Court.

Tennessee Code Annotated, § 49-2-201, states in pertinent part:

> (a)(1) Notwithstanding any other law to the contrary, there shall be a board of education elected by the people. . . . Members of county boards of education shall be residents of and elected from districts of substantially equal population established by resolution of the local legislative body. . . .
>
> (c) Only persons who are residents of the area served by a local education agency are eligible to serve on the school board in counties with populations of seven hundred thousand (700,000) or more according to the 1990 federal census or any subsequent federal census. [Currently applicable only to Shelby County school board.]

STATEMENT OF THE CASE

A. Statement of the Facts

The Tennessee legislature has established two separate public school systems in Shelby County, Tennessee. The area of Shelby County lying beyond the Memphis city limits, including six incorporated towns, is served by the Shelby County school district. 1923 Tenn. Priv. Acts, ch. 381. Since its establishment in current form in 1923, its members have been appointed by the local legislative body, *i.e.*, the Board of Commissioners of Shelby County, Respondents in this Petition. The boundaries of the county school district are set by statute as the area in Shelby County outside Memphis. (*Id.*, R.66, Stipulation, ¶¶ 4,6, App. 213).

The City of Memphis has chosen to operate its own school system, independent of the county system. Memphis City Schools (first established 1868) educates elementary and secondary students residing within Memphis city limits. 1868-1869 Tenn. Priv. Acts, ch. 3. Memphis residents have always elected their board of education. Residents of Shelby County who live outside of Memphis have never participated in those elections. The City of Memphis is the only city or area within Shelby County that is served by its own, separate school district. The boundaries of the Memphis school district are set by statute as the boundaries of the City of Memphis. (*Id.*, R.66, ¶¶ 5, 6, App. 213).

The Tennessee legislature recently enacted the Education Improvement Act (EIA) which mandates the popular election, by district, of all public school boards in the state. Tennessee Code Annotated § 49-2-201(a)(1). This requirement raised the question before the court — which county residents should vote in elections for the Shelby County school district, those in the county school district or all county residents. The question arises because there is a conflict in the applicable state and federal law.

The Tennessee Constitution provides that, "No County office created by the Legislature shall be filled otherwise than by the people or the County Court" (the prior name for the Board of Commissioners). Tenn. Constitution, art. XI, § 17. No Tennessee constitutional or statutory provision defines county school board members as county officers. However in a 1946 case, the Tennessee Supreme Court accepted a stipulation by parties to that case, to the effect that county school board members are "county officers" for purposes of art. XI, § 17 of the state Constitution. Based on that stipulation, the state Supreme Court ruled that if county school board members are to be elected by the people, then the state Constitution

contemplates election by all voters in a county, specifically including those voters residing in a city served by a separate school district. *Southern v. Beeler*, 195 S.W. 2d 857 (1946).

In compliance with that Tennessee case law and the new election requirement imposed by the EIA, Respondent Board of Commissioners adopted a Resolution on May 2, 1996, providing for a county-wide election for the Shelby County school board, including voters who reside outside the county school district, or within the Memphis city school district (Plan C). (R. 66, ¶10, App. 214, 233-236). In recognition of federal cases on the subject, specifically *Duncan v. Coffee County, Tennessee*, 69 F.3d 88 (6th Cir. 1995), and caught between the conflicting requirements of state and federal law, the Board of Commissioners also directed the County Attorney to file this suit, seeking a declaration that inclusion of out-of-district voters in the county school district electorate would unconstitutionally deprive county district residents of their Fourteenth Amendment rights, through vote dilution. (R.1, Complaint, Ex. A, App. 28, 235).

The May 2, 1996, Resolution also provides that in the event the county-wide plan is declared unconstitutional, an alternative plan for election by county school district voters only (Plan A) will go into effect. (*Id.*, R.66, ¶ 33, App. 225-226). An additional complication arises as a result of Tenn. Code Ann. § 49-2-201(c) of the EIA, which limits eligibility to serve on the county school board to residents of the county school district.

Following precedent established by the Sixth Circuit in *Duncan*, and three other circuits, the courts below considered four factors in concluding that the voters outside the Shelby County school district had no substantial interest in the county school system sufficient to warrant their inclusion in the election for county school board. Those four factors are: (1) population; (2) funding; (3) joint programs; and (4) cross-over students.

The population of the City of Memphis accounts for 74.82% of Shelby County's population of 826,330 (1990 census). (R.66, ¶ 28, App. 224). Memphis voters constitute 71.2% of the 512,245 registered voters in the county. (R.66, ¶ 29, App. 224). In the county-wide plan rejected by the courts below, Memphis school district voters account for the following percentages: District 1, 70.3%; District 2, 93.3%; District 3, 88.7%; District 4, 68.3%; District 5, 53.1%; District 6, 100%; District 7, 31.1%. (R.66, ¶ 32, App. 225). *See also Board of County Commissioners v. Burson*, 121 F.3d 244, 246 n.2 (6th Cir. 1997); Pet. App. 5, 21 n.1). Thus, in only one of the seven districts would county school district voters have a majority. Because of the population disparity between Memphis school district voters and the county school district voters, any county-wide districting plan would necessarily result in a similar disparity in favor of Memphis voters. Furthermore, under the provisions of Tenn. Code. Ann. § 49-2-201(c) no voter in District 6 would be eligible to serve.

Local funding for schools, from property and sales tax collections, is distributed by the Shelby County Trustee (tax collector) according to a state-mandated formula based upon average daily attendance in the two school districts.[1] Under that method, the Trustee distributes 70.8% of all such funds to Memphis City Schools ($162.2 million), and 29.2% to the Shelby County school district ($67 million). (R. 39, ¶¶ 5, 10, App. 117, 119-120; R. 59, App. 206). These figures represent a nearly $3.6 million net transfer from the area served by the county school

---

1. The Shelby County Board of Education and the Board of Education of Memphis City Schools have no power to levy taxes of any kind, no power to appropriate funds, no power to borrow, and no power to create indebtedness. In the case of the Shelby County school system this power rests with the Respondent Board of Commissioners, and in the case of the Memphis City Schools this power rests with the Memphis City Council and the Respondent Board of Commissioners. (R.66, ¶ 15, App. 218).

district, toward the city school district's budget.[2] (R.39, ¶ 16, App. 121; *see also* R. 59, App. 206).

With regard to cross-over students, the third *Duncan* factor, the courts below found that the limited number of such students favored the Plaintiff (the County) in this analysis. The actual number of city students attending county schools is less than one percent of the county students. 121 F.3d at 251, Pet. App. 16; (R.66, ¶ 36, App. 227).

Finally, the existence of joint programs was found to be of no importance in the analysis. The Defendants (State) pointed to the existence of some volunteer or extracurricular programs such as the Science Fair and other programs made available by third parties, of which both school systems partake. As the Sixth Circuit concluded: "It is, however, doubtful that these are the type of 'joint programs' contemplated in *Duncan*." 121 F.3d at 251, Pet. App. 16. In any event, the courts below concluded that this factor, even if considered as favorable to the State, would be overcome by the population and financial analysis.

B. Proceedings Below

The Board of Commissioners of Shelby County and the County of Shelby filed this suit in accordance with the Resolution of May 2, 1996, seeking a declaration that county-wide districts drawn according to the 1946 state Supreme Court case would result in a violation of federal voting law. The suit was based on the Fourteenth Amendment analysis of the Court of Appeals for the Sixth Circuit in *Duncan v. Coffee County, Tennessee*, 69 F.3d 88 (6th Cir. 1995). The United States District

2. Additionally, the City of Memphis contributes a substantial amount to Memphis City Schools (an entity separate from the City of Memphis). State law does not require that City money be distributed to the county school district, and it is not.

Court for the Western District of Tennessee held that the *Duncan* analysis required a ruling in favor of Plaintiffs and a declaration that Plan C (the county-wide Plan) was unconstitutional. On cross-motions for summary judgment, the District Court found that the population of the out-of-district voters was so large as to prevent the residents of the county school district from controlling their own school system, that the net flow of funds indicated that the county residents were subsidizing the city system rather than the other way around, that there were a minimal number of crossover students and that the existence of joint programs was questionable and irrelevant, in view of the other factors. The Sixth Circuit affirmed the District Court's ruling in favor of Plaintiff-Respondents, concluding that the proper "geopolitical entity" at issue is the Shelby County school district, not the County of Shelby itself; that non-resident (*i.e.*, Memphis) voters do not have a "substantial interest" in the governance of the Shelby County school district, according to the factors just stated, sufficient to justify their inclusion in its electorate; and that inclusion of non-resident voters, who would constitute 71.2% of the vote and a majority in six of the seven electoral districts, would unconstitutionally dilute the votes of those who actually reside in the area served by the Shelby County school district.

The Sixth Circuit denied Petitioners' request for a rehearing *en banc*.

SUMMARY OF THE ARGUMENT

In this vote dilution case, the question is whether the United States Court of Appeals for the Sixth Circuit so departed from rulings of this Court and its sister circuits that this Court should grant the Petition for a Writ of Certiorari. The Sixth Circuit ruled that inclusion of out-of-district residents in the electorate of a county school board, which out-of-district residents comprise

74.82% of the total county population and 71.2% of its registered voters, unconstitutionally dilutes the votes of those who actually reside within the district and whose families are served by it. Both the District Court and the Court of Appeals correctly followed their controlling precedent, *Duncan v. Coffee County, Tennessee*, 69 F.3d 88 (6th Cir. 1995), in defining the geopolitical unit concerned as the Shelby County school district, rather than as the County of Shelby, Tennessee. The determination was explicitly based on this Court's rulings in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) and *Dunn v. Blumstein*, 405 U.S. 330 (1972). *Board of County Comm'rs v. Burson*, 121 F.3d 244, 248 (6th Cir. 1997), Pet. App. 8, *Duncan*, 69 F.3d at 93. Both *Duncan* and the ruling in this case are consistent with those decisions and follow the same law and analysis used by every other circuit that has ruled on these issues. *See Creel v. Freeman*, 531 F.2d 286 (5th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1976); *Davis v. Linville*, 864 F.2d 127 (11th Cir. 1989), *reh. denied*; *Sutton v. Escambia Co. Bd. of Education*, 809 F.2d 770 (11th Cir. 1987); *Hogencamp v. Lee Co. Bd. of Education*, 722 F.2d 720 (11th Cir. 1984); *Phillips v. Andress*, 634 F.2d 947 (5th Cir. 1981); *Locklear v. North Carolina St. Bd. of Education*, 514 F.2d 1152 (4th Cir. 1975); *see also Hosford v. Ray*, 806 F. Supp. 1297 (S.D. Miss. 1992).

The Sixth Circuit further correctly applied the same four factors used in *Duncan*, and in the other circuits, for determining whether out-of-district residents possess a substantial interest in the county school board sufficient to justify their inclusion in its electorate. Those factors include:

(1) the degree to which one district is financing another;

(2) the voting strength of the non-resident voters;

(3) the number of, or potential for, crossover students;

(4) the existence of any joint programs.

Board of County Comm'rs v. Burson, 121 F.3d 244, 248 (6th Cir. 1997), Pet. App. 9, *Duncan*, 69 F.3d at 96. *See also* cases cited, *supra*. In thorough discussions of the factors, the courts below properly ruled that out-of-district residents lacked any substantial interest in the governance of the Shelby County school district, and accordingly that their inclusion in its electorate would not be rational. The Sixth Circuit affirmed the District Court's ruling that it is "almost a given" that inclusion of out-of-district residents in the electorate of the Shelby County school district, according to state constitutional interpretation, would result in a violation of the federal Fourteenth Amendment rights of citizens residing in the county school district, through dilution of their votes.

The Sixth Circuit's opinion in this case therefore is in accord with the other circuits in ruling that the State's interest in a uniform system of public education could not prevail over the federal constitutional rights of the citizens of the Shelby County school district.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' DETERMINATION OF THE PROPER ELECTORAL JURISDICTION AS THE SHELBY COUNTY SCHOOL DISTRICT, RATHER THAN SHELBY COUNTY, IS IN CONFORMANCE WITH PRECEDENTS OF THIS COURT, AND OF ALL CIRCUITS THAT HAVE ADDRESSED THE ISSUE.

The quick answer to the Petition is a mere reference to the supremacy clause. *See Board of County Comm'rs v. Burson*, 121 F.3d 244, 249 (6th Cir. 1997), Pet. App. 11. Petitioners argue that state case law would require designation of a county-wide

electorate. The crux of Petitioners' error is this: that 1946 Tennessee case law pre-dates the entirety of vote dilution law. Petitioners' arguments, relying upon fifty-year old state court designations of the proper "governmental unit at issue," are therefore flawed from the outset.

The Sixth Circuit's opinion fully accords with this Court's precedents, and in particular with *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978). In *Holt*, this Court rejected the argument by plaintiffs living within a city's three-mile "police jurisdiction," but not within the city itself, that they should vote in city elections:

> No decision of this Court has extended the "one-man, one vote" principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions. On the contrary, our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 343-344, 92 S.Ct. 1752, 26 L.Ed.2d 370; *Evans v. Cornman*, [398 U.S. 419,] 422, 90 S.Ct. 1752, 26 L.Ed.2d 370; *Kramer v. Union Free School Dist.*, 395 U.S. at 625, 89 S.Ct. 1886, 23 L.Ed.2d 583; *Carrington v. Rash*, 380 U.S. 89, 91, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965); *Pope v. Williams*, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed.2d 817 (1904).

439 U.S. at 68-69.

The Shelby County school district is a "political subdivision" of the State of Tennessee. The Tennessee legislature created the Shelby County school district and Memphis City

Schools by separate "private acts," as they are called in Tennessee, nearly sixty years apart. The Sixth Circuit recognized both in *Duncan v. Coffee County, Tennessee*, 69 F.3d 88 (6th Cir. 1995) and in this case, that distinct school districts, even county school districts, are "geopolitical units" separate from the counties in which they are located. In making that determination, the Sixth Circuit explicitly relied upon a series of cases from other circuits that have considered the issues. In *Duncan*, residents of the Rural Coffee County School District sued to prevent Tullahoma city residents (served by a separate city school district) from voting for their county board. The Sixth Circuit ruled as follows (Coffee County itself, along with the State, defended the inclusion of Tullahoma residents).

> "[The Supreme Court] has made clear that a citizen has a constitutionally protected right to participate on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 999-1000, 31 L.Ed.2d 274 (1972). . . . However, we think Coffee County's definition of the relevant geographic jurisdiction is mistaken.
>
> The crucial phrase in *Dunn* is "in the jurisdiction." Here, that "jurisdiction" is not the whole county, as Coffee County would like us to believe. Instead, the proper definition of the appropriate jurisdiction is the Rural Coffee County School District. Therefore, Tullahoma residents do not reside in the relevant geopolitical entity: the Rural Coffee County School District. Instead they live in an adjacent political jurisdiction called the Tullahoma School District. The Supreme Court has made it clear that "our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its

borders. *Holt Civic Club* [*v. City of Tuscaloosa*], 439 U.S. at 67, 99 S.Ct. at 388.

. . . In the instant case, the Coffee County School District does not have . . . broad power over the residents of Tullahoma. For example, the power to lay and collect taxes is beyond the authority of the school boards. As *Holt Civic Club* demonstrates, even if the Board did have much broader powers, the Constitution would not require that Tullahoma residents be granted the franchise in the Rural Coffee County School District, because they simply do not live in the Rural Coffee County School District. The Supreme Court has clearly stated that "[n]o decision of this court has extended the 'one man, one vote' principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions." *Id.* at 68, 99 S.Ct. at 388.

. . . Although Tullahoma residents live in a political entity called Coffee County, they do not in this case live in the political entity that we call the Rural Coffee County School District. Similarly, in *Sutton* the City of Brewton residents lived in the Brewton school district, but they did not live in the Escambia County school district, *Sutton* [*v. Escambia County Bd. of Education*, 809 F.2d 770, 771 (11th Cir. 1987)], and in *Phillips*, the City of Tuscaloosa residents lived in the Tuscaloosa City school district, but not the Tuscaloosa County school district. *Phillips* [*v. Andress*, 634 F.2d 947, 950 (5th Cir. 1981)]. *See also Creel* [*v. Freeman*, 531 F.2d 286 (5th Cir. 1976)] at 286-288.

The Fourth Circuit has also emphasized the importance of residing "in the jurisdiction" when it ruled that city-district voters did not have a substantial interest in a county school district, and therefore should not vote in county school elections. *Locklear v. North Carolina St. Bd. of Education*, 514 F.2d 1152, 1154 n.5 (4th Cir. 1975). The District Court for the Southern District of Mississippi reached the same conclusion. *Hosford v. Ray*, 806 F. Supp. 1297, 1307 (S.D. Miss. 1992), quoting *Phillips v. Andress*, 634 F.2d 947, 950 (5th Cir. 1981), which in turn quoted *Creel v. Freeman*, 531 F.2d 286, 288 (5th Cir. 1976), *cert. denied*, (1976).

In some of these cases, including *Duncan*, city school district residents were permitted to vote in county school district elections; in others, as in the instant case, courts ruled that city district residents should not vote in the adjoining county school district elections. Although the facts dictated different results, all courts used the same law (or earlier developments of that law) and the same analysis in reaching the results.

The ruling below, and the various similar cases, are all in accord with this Court's ruling that,

> A State cannot of course manipulate its political subdivisions so as to defeat a federally protected right. . . .

Sailors v. Kent Board of Education, 387 U.S. 105, 108 (1967) (William O. Douglas, J). The Sixth Circuit affirmed that applying Petitioners' arguments in our situation would result in a defeat of county school district residents' federally protected voting rights. The Court of Appeals explicitly and correctly relied on the precedents of this Court and utilized the same law and the same analysis used by every other circuit and District Court that has addressed these issues. The case is not one appropriate for this Court's attention, and the Petition should be denied.

II.

THE SIXTH CIRCUIT OPINION DOES NOT CREATE NEW RIGHTS, BUT AFFIRMS AND APPLIES EXISTING RIGHTS.

The Tennessee Attorney General is rightly concerned, even in these discrete and peculiar circumstances, when state court interpretations of the state Constitution, though fifty years old, are found in conflict with the federal Constitution. The problem with the Attorney General's argument, as before, is that in its reliance on a 1946 state Supreme Court case, it necessarily ignores federal voting rights law, which began development twenty years later. The Sixth Circuit's opinion involves no new law, nor a new twist on old law, but a mere application of widely-recognized existing law. This Court enunciated the principle at issue here more than thirty years ago:

> But it is also quite clear that a state legislative apportionment scheme is no less violative of the Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a noncompliance with state constitutional requirements. When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls.

Reynolds v. Sims, 377 U.S. 533, 584 (1964).

This Court, in another case from the Sixth Circuit, set out the principles for balancing a State's interest against citizens' constitutionally-protected interests. The Court stated that,

> [in c]onstitutional challenges to specific provisions of a State's election laws . . . a court . . . must first

> consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (statutory March filing deadline for November presidential election held unconstitutional burden on voting and associational rights of supporters).

Here, the voting rights of the county district residents are of a constitutionally fundamental character and magnitude.

> The right of suffrage . . . is regarded as fundamental under our constitutional structure. The right to vote is regarded as fundamental because it preserves all other rights; other rights, even the most basic, are illusory if the right to vote is undermined.
>
> The fundamental right to vote includes the right to participate in elections on an equal basis with other citizens in the jurisdiction, as well as the right to cast an effective vote.

25 *Am. Jur. 2d* "Elections" § 103, citing for the last paragraph *Anderson v. Celebrezze*, and *Miyazawa v. City of Cincinnati*, 45

F.3d 126 (6th Cir. 1995). "[V]ote dilution is as nefarious as an outright prohibition on voting." *Duncan*, 69 F.3d at 93. The rights of the district residents being fundamental, they must be regarded with a paramount respect.

As for the "precise interests put forward by the State," they consist of statements that uniformity of local school governance is an important state goal. True no doubt, but as a counter-weight to the fundamental constitutionally protected rights of the district residents, it does not compare.

Nor is Petitioners' assertion valid, that these election districts "disenfranchise" the voters who reside in the neighboring school district. First, no citizen of Shelby County — whether residing in or out of the Shelby County school district — has ever voted for the county school board; board members have been appointed since the board's creation in 1923. By definition, without enfranchisement there can be no disenfranchisement. *See Sailors v. Kent Bd. of Education*, 387 U.S. 105 (1967); 25 *Am. Jur. 2d* "Elections" § 31. Second, voters in the adjoining Memphis City Schools district will continue to elect their own school board without the participation of county school district voters. Thus, there is no dilution of city voting strength.

Petitioners incorrectly rely upon *Kramer v. Union Free School District*, 395 U.S. 621 (1969), which invalidated a New York statute limiting a school board electorate to real-property owners and parents of students, and excluded all other district residents. In this case, Respondents sought a declaration of the proper electorate, and the enfranchisement of *all* qualified *residents* of the county school district.

Residency within the voting district also distinguishes *Evans v. Cornman*, 398 U.S. 419 (1970), and *Carrington v.*

Rash, 380 U.S. 89 (1965), both relied upon by Petitioners, from our situation. In *Evans*, this Court ruled that Maryland could not exclude from the state electorate *residents* of federal property *within* Maryland. More telling for the instant case, the Court wrote, "a State may not dilute a person's vote to give weight to other interests, *see, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964)."

In *Carrington*, this Court ruled that federal election law superseded a Texas state constitutional provision, that prohibited servicemen who declared Texas *residency* from voting in Texas elections so long as they remain in the service. The Court concluded its opinion with the following caveat.

> We emphasize that Texas is free to take reasonable and adequate steps, as have other States, to see that all applicants for the vote actually fulfill the requirements of bona fide residence.

380 U.S. at 96. The Sixth Circuit ruling in this case extends the franchise to all qualified *residents* of the Shelby County *school district*. It is distinguishable from Petitioners' cases and it correctly follows this Court's precedents.

Petitioners' portrait of a single system for governing all 95 Tennessee county school boards is also incomplete. A review of Tennessee public school systems reveals that they are not uniform. Of the four large counties, for example, Shelby County (with the largest population in Tennessee) is the only one with two public school systems. In addition to the private act that created the Shelby County school district in 1923, the Tennessee legislature's 1992 Education Improvement Act specifically confirmed the separate status of the Shelby County school district. Tenn. Code Ann. § 49-2-201(c) reads,

> Only persons who are residents of the area served by a local education agency are eligible to serve on the school board in counties with populations of seven hundred thousand (700,000) or more according to the 1990 federal census or any subsequent federal census.

Only Shelby County has a 1990 population of 700,000 or more in Tennessee. The statute thus addresses and recognizes the Shelby County school district as an entity distinct from other districts. The legislature specifically verified that the Shelby County school district is an entity separate from the adjoining Memphis City Schools district.

Circuit Judge Merritt's concurrence in the order denying application for a rehearing noted this recognition. Pet. App. 60-61. The Sixth Circuit's panel opinion is in accord with the legislature's recognition. More importantly, the opinion is in compliance with existing law. The opinion does not expand upon existing law; it merely applies that law to these circumstances — circumstances which, as Judge Merritt suggested, are unlikely to be repeated elsewhere. Pet. App. 60-61. Petitioners raise no issues requiring this Court's review of the matter, and the Petition should be denied.

CONCLUSION

Wherefore, and for all of which, the Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

DONNIE E. WILSON
Shelby County Attorney
160 North Main Street
Suite 660
Memphis, Tennessee 38103
(901) 576-4230

JOHN L. RYDER*
Assistant County Attorney
APPERSON, CRUMP & MAXWELL, PLC
2110 One Commerce Square
Memphis, Tennessee 38103
(901) 525-1711

BRIAN L. KUHN
Assistant County Attorney
FARRIS, MATHEWS, BRANAN
& HELLEN, PLC
2000 One Commerce Square
Memphis, Tennessee 38103
(901) 575-0100

Attorneys for Respondents
Board of County Commissioners
of Shelby County and County of Shelby

* *Counsel of Record*